PD-0776-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
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SAMUEL UKWUACHU,	§	
Respondent	§	
	§	
	§	
vs.	§	**NO. PD-0776-19**
	§	
	§	
THE STATE OF TEXAS,	§	
Petitioner	§	

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RESPONDENT'S BRIEF ON THE MERITS ON PETITION FOR DISCRETIONARY REVIEW OF THE COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS NUMBER 10-15-00376-CR

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IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AUSTIN, TEXAS

SAMUEL UKWUACHU,	§	
Respondent	§	
	§	
	§	
vs.	§	**NO. PD-0366-17**
	§	
	§	
THE STATE OF TEXAS,	§	
Petitioner	§	

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RESPONDENT'S BRIEF ON THE MERITS ON PETITION FOR DISCRETIONARY REVIEW OF THE COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS NUMBER 10-15-00376-CR

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STATEMENT OF THE CASE

SAMUEL UKWUACHU, hereinafter referred to as Respondent, was charged by indictment in McLennan County, Texas with the offense of sexual assault. Respondent was tried in the 54th District Court on his plea of not guilty to the jury on August 17 through August 21, 2015. The jury found the Respondent guilty of the offense of sexual assault and assessed punishment at eight (8) years confinement in the Texas Department of Criminal Justice – Institutional Division and no fine. Further, the jury granted the Respondent's application for community supervision and recommended that the term of

imprisonment be suspended and the Respondent placed on community supervision. The court-imposed sentence, followed the jury's recommendation, and set the term of community supervision at ten (10) years, as well as adding the condition that the Respondent serve 180 days in the McLennan County Jail. Notice of Appeal was timely filed by the Respondent. The 10th District Court of Appeals, on March 22,2017, in a Memorandum Opinion, reversed the Respondent's judgment of conviction based on the issues raised in this brief on original submission. On June 6, 2018, on State's Petition for Discretionary Review, the Court of Criminal Appeals issued three (3) opinions reversing the decision of this Court and remanded the cause for further proceedings. On remand after again briefing the remaining points of error, the 10th District Court of Appeals, on July 10, 2019, in a Memorandum Opinion, again reversed the Respondent's judgment of conviction based on two of the remaining issues raised in this brief on original submission. On July 26, 2019 the Petitioner filed State's Petition for Discretionary Review which was granted by this Court.

STATEMENT REGARDING ORAL ARGUMENT

Texas Rule of Appellate Procedure 39.1 states:

A party who has filed a brief and who has timely requested oral argument may argue the case to the court unless the court, after examining the briefs, decides that oral argument is unnecessary for any of the following reasons:

(a) the appeal is frivolous;

(b) the dispositive issue or issues have been authoritatively decided;

(c) the facts and legal arguments are adequately presented in the briefs and record; or

(d) the decisional process would not be significantly aided by oral argument.

Respondent would show that oral argument would significantly aid the Court to correct the mischaracterization and confusion of the issue by the State in dealing with the basis of the opinion of the Tenth Court of Appeals.

STATEMENT OF THE FACTS

The Statement of the Facts portion of Petitioner's brief, by omission, fails to fully present the proceedings at trial forming the basis of Respondent's points of error reversed by the Tenth District Court of Appeals.

On the 20th day of October, after the homecoming party, C.W. again began texting with the Respondent. (R.R.V 146) Before leaving the homecoming party at the Convention Center, C.W. saw the Respondent and was asked to call him for plans after the party. (R.R.V 149) When C.W. got home from the party, she called the Respondent and he came to her apartment to pick her up. (R.R.V 149) The Respondent then drove C.W. to his apartment. (R.R.V 150) They went into the Respondent's bedroom. (R.R.V 152) In the bedroom was when the C.W. testified that she and the Respondent had sexual intercourse without her consent. (R.R. V 156-59)

The Respondent testified that he did not sexually assault C.W. (R.R. XI 92) He did testify that he had consensual sex with C.W. (R.R.XI 92)

On the second day of trial, the prosecutors stated that they had received, that morning, the telephone records of Ratu Peni Tagive (R.R.X 13). The Respondent was unaware of the telephone records of Mr. Tagive and had never seen those when the prosecutor announced that they had received the records that day (R.R.X 14). Outside the presence of the jury, the prosecutor stated that the phone records did not support Mr. Tagive's statements as to his location on the early morning hours of October 20, 2013 (R.R.X 14). At that time, the court instructed the prosecutors to turn the phone records over to the Respondent. (R.R.X 14).

Respondent then advised the court that Mr. Tagive was intended to be called as a witness during the defense case (R.R.X 15). The prosecutor stated that Mr. Tagive's attorney advised he would probably plead the Fifth Amendment based on the records (R.R.X 14). Respondent stated that in fairness he would need time to look at the records and requested a delay in the proceedings (R.R.X 16). The prosecutor advised the Respondent that the prosecutor could tell him "in thirty seconds what they show" (R.R.X 16). The prosecutor further stated that Mr. Tagive "told us in the Grand Jury that he had his phone with him and he had been asleep all night. And so that does not match his testimony……" (R.R.X 16). The Respondent questioned the "science" necessary to show the location of a call using the records without an expert (R.R.X 59-61).

Ultimately the court agreed to give the Respondent the afternoon to "research the records" (R.R.X 63). The prosecutor opposed the delay for the afternoon since he believed through the attorney for Ratu Peni Tagive that he was going to "take the Fifth" (R.R.X 64).

The next morning, Respondent filed a Second Motion in Limine directed at the telephone records of Mr. Tagive (C.R. 585; R.R.XI 7). The Second Motion in Limine requested that they not be mentioned in court prior to the parties approaching the bench and determining their admissibility (R.R.XI 7). The prosecutor responded that they were business records (R.R.XI 7). The Respondent pointed out that there was no business records affidavit timely filed to allow their admission (R.R.XI 8). Further, Respondent noted that the times listed on the business records were 5 hours off from the actual time in Waco, Texas and did not contradict the timing of telephone calls of Mr. Tagive

(R.R.XI 8). The prosecution still maintained there was conflict with what Mr. Tagive's testimony was and believed there was "good faith reason to ask those questions about where - - if he says he's home and bed asleep at 12:30 and making phone calls at 2:00 in the morning I think there is a good reason to ask why his business…why his phone records show that" (R.R.XI 8). The court ruled that the phone records were not going to be admitted as a business record (R.R.XI 9). The court ruled that the prosecutor can "ask him if he was making phone calls" (R.R.XI 9).

At the Motion for New Trial hearing, Defendant's Exhibit #2 was admitted into evidence (R.R.XIV 8). Defense Exhibit #3 is the Affidavit of Dan James who provided Curriculum Vitae along with his Affidavit establishing his qualifications as a Computer Forensic Examiner and Criminal Investigator (R.R. XV Def.Exh. 2). Mr. James' affidavit demonstrated that the longitude and latitude figures provided on the mobility usage are rarely accurate (R.R. XV Def.Exh. 2). That it would take an expert a number of hours to evaluate the records and cell tower locations in order to make a final determination on whether the longitude and latitude listed is accurate (R.R. XV Def.Exh. 2). Further, without proper training and expertise necessary in order to properly evaluate the accuracy of records, any use of those records would be reckless and without any factual basis (R.R. XV Def.Exh. 2).

Morgan Reed, a student at Baylor, testified that she knew C.W. from her freshman year when they lived in the same apartment complex (R.R.XI 23-25). On homecoming night of 2013, Ms. Reed received a phone call around midnight from Mr. Tagive to get a ride from a party at the Convention Center (R.R.XI 25). Ms. Reed picked Mr. Tagive

up around 12:30, they went to get something to eat and then back to his apartment (R.R.XI 26). After returning Mr. Tagive to his apartment, Ms. Reed stayed until about 1:00 to 1:30 a.m. when she left (R.R.XI 26). After she left, Mr. Tagive texted or called her thanking her for the ride (R.R.XI 27).

On cross examination of Ms. Reed, the prosecution questioned Ms. Reed by asking *"why are you calling him at 1:00 a.m. according to his phone records? Why is he calling you from across town at 1:00 a.m. far away from his apartment?"* (R.R.XI 30). An objection is registered to this question by the Respondent after which an off the record bench conference with the court and counsel was conducted (R.R.XI 30).

The prosecutor then asked a question *"Can you tell this jury why your phone records show he called you at 1:00 from across town from his apartment?"* (R.R.XI 30). Ms. Reed stated that she did not believe that was true (R.R.XI 30). The prosecutor went on and confirmed her telephone number and then continued to ask a question that Ratu Peni Tagive made calls at 1:00 from across town and why this does not match her testimony (R.R.XI 31).

Ratu Peni Tagive testified that he was Respondent's roommate during the fall of 2013 at the Grove Apartments in Waco, Texas. (R.R.XI 37) Mr. Tagive also knew C.W. from seeing her at a rehab facility at Baylor University. (R.R.XI 37) Mr. Tagive remembers seeing C.W. with the Respondent at their apartment on four or five occasions. (R.R.XI 38-39)

On the night of homecoming 2013, Mr. Tagive went home after the football game, showered and then left to go to the homecoming party at the Convention Center in Waco.

(R.R.XI 45-46) Since Mr. Tagive had some drinks at the party, he called Morgan Reed to pick him up from the Convention Center and give him a ride home. (R.R. XI 46). He believed he called her around 12:30 a.m. (R.R.XI 47) Ms. Reed picked up Mr. Tagive and they went by to get something to eat and then went on to his apartment. (R.R.XI 47-48) After arriving at the apartment, Mr. Tagive and Ms. Reed took a puppy outside while Mr. Tagive ate the food that they had picked up. (R.R.XI 50) After returning to the apartment, Ms. Reed left to go home and Mr. Tagive went to his room to go to bed. (R.R.XI 51) Nobody was at the apartment when Mr. Tagive went to bed. (R.R.XI 51).

Mr. Tagive remembers hearing the Respondent's voice and a female voice with him while he was in his room. (R.R.XI 52) He later heard the Respondent and the female apparently go into his bedroom and did not hear any other activity, including screaming, that evening. (R.R.XI 53-54).

On cross examination of Mr. Tagive, the prosecution questioned Mr. Tagive by asking *"you know your phone records show you were across town at one o'clock in the morning…"* (R.R.XI 60).

C.W. had testified that during the course of her sexual encounter with the Respondent during the early morning hours of October 20, 2013, that she was screaming and yelling no in such a manner that if Mr. Tagive was present in his bedroom in the apartment, he would hear her. (R.R.VIII 137-38). Because of this testimony by C.W., it was the prosecution's attempt to place Mr. Tagive outside of the apartment so that his testimony that he did not hear anything the early morning hours of October 20, 2013

coming from his roommate's room would not be believed. (R.R.XI 14). The phone records were referenced during the State's closing argument by arguing that *Mr. Tagive was making "calls all over town."* (R.R.XI 197, 221).

SUMMARY OF THE ARGUMENT

Morgan Reed gave Ratu Peni Tagive a ride home to his apartment following the homecoming party at the Convention Center in Waco, Texas on October 20, 2013. Ratu Peni Tagive was the roommate of the Respondent in a two-bedroom apartment. Morgan Reed testified that she took Mr. Tagive to that apartment at approximately 1:00 to 1:30 a.m. on October 20, 2013 and left him there. She testified that on her way home she received a text or call from Mr. Tagive to thank her for the ride. On cross-examination, the prosecutor questioned Ms. Reed about the truthfulness of her testimony based on unadmitted telephone records of Mr. Tagive which the State inferred proved he was across town and at a different time when he placed the call or text to her. The telephone records were not introduced into evidence nor substantiated as to the location of a telephone or the time a call or text was originated. The cross-examination created a false impression with the jury that Mr. Tagive was placing a call or text to Ms. Reed from a location other than his apartment at a different time. No such evidence of the location of Mr. Tagive's telephone or the time calls or texts were originated were ever introduced into evidence during trial.

ARGUMENT

The State's position is "Can you have a "false Testimony" claim without testimony or falsity"? Its argument is prefaced by the introduction which correctly states that the prosecution should avoid leaving a false or misleading impression through its questions and argument. The State then begins its argument of mischaracterization with a warning to the Court of Appeals that it should not ignore basic rules of appellate procedure and grant relief on claims that have no basis in fact. (St. Br. on PDR p. 1,2) The true issue is whether conduct by prosecutors creating a false impression to a jury can be allowed under the protections of due process.

The State's argument in broken into three (3) basic parts. First, questioning what claim was decided by the Court of Appeals. Second, did the Respondent preserve a false testimony claim. And, third, that there was no evidence the State said or did anything misleading. (St. Br. on PDR p.9,12,14)

A DUE PROCESS CLAIM WAS DECIDED BY THE COURT OF APPEALS

The answer to the first question posed in the State's brief is answered by the description of what constitutes false testimony. In determining whether a particular piece of evidence has been demonstrated to be false, the Courts have explained that the relevant question is whether the testimony, taken as a whole, gives the jury a false impression. **Ex parte Ghahremani,** 332 S.W.3d 470, 478 (Tex.Crim.App. 2011) (agreeing with convicting court's determination that evidence was false because it " creat[ed] a misleading impression of the facts"); *see also* **Alcorta v. Texas**, 355 U.S. 28 (1957) (evidence is false if it leaves jury with a " false impression"). " [I]mproper

suggestions, insinuations and, especially, assertions of personal knowledge constitute false testimony." **Ex parte Robbins,** 360 S.W.3d 446, 460 (Tex.Crim.App. 2011). The Courts have consistently held that testimony " need not be perjured to constitute a due process violation; rather it is sufficient that the testimony was false." **Ex parte Chavez,** 371 S.W.3d 200, 207 (Tex.Crim.App. 2012) (citing Robbins, *supra*). That is because a false-evidence due-process claim is " not aimed at preventing the crime of perjury--which is punishable in its own right--but [is] designed to ensure that the defendant is convicted and sentenced on truthful testimony." **Ex parte Weinstein,** 421 S.W.3d 656, 664 (Tex.Crim.App. 2014).

The State cites this court's decision in **Ex Parte Storey**, ____ S.W. 3d ____ (Tex. Ct. Crim. App. 2019, no. WR-75,828-02 dec'd 10/2/2019) to support its position that false evidence must be admitted to support a due process violation. The Per Curium opinion dismissed the subsequent application for writ of habeas corpus as an abuse of the writ without reviewing the merits. Language used in a concurring opinion, addressing the allegation that a statement made by the prosecutor during closing argument at punishment was false evidence, was cited in an attempt to analogize to the current fact situation. (ST. Br. on PDR p. 10) The analogy fails on the facts of each case. The issue decided in the instant case is a false impression created by the prosecutor during testimony of Defense witnesses at guilt-innocence. The false impression was that the prosecutor knew what the non-evidentiary records showed and that the witness' testimony was false. This assertion by the prosecutor was done without any factual basis

in the record. This is what the State, in its brief, characterizes as a "possibly unjustified confidence" claim. (St. Br. on PDR p. 11) Instead, it is a violation of the Respondent's due process rights.

The Court of Appeals looked at this action by the prosecutor using a twofold due-process inquiry. First, the Court held that:

> …"the State's repeated references to what the cell phone records showed, including the location and time of calls made, without their admission into evidence created a false impression with the jury. Testimony was elicited from (Respondent's roommate and roommate's friend) while referencing records that were not in evidence and in a manner that indicated that the records definitively showed (Respondent's) roommate's location at certain critical times when they did not." Ukwuachu, 2019 WL 3047342, at 6

Next, the Court held:

> "The State's case was strengthened significantly by showing that (Respondent's) roommate was not in the apartment or that he was making calls at times he had contended he was asleep based on records that the State knew it could not admit into evidence and that created a false impression. We find that there is a "reasonable likelihood" that the false impression affected the judgment of the jury." Ukwuachu, 2019 WL 3047342, at 7

The Court clearly decided a due Process claim in reversing the judgment of conviction.

THE DUE PROCESS CLAIM CANNOT BE FORFEITED

Tex. R. App. Proc. 33.1 establishes the general requirement that a contemporaneous objection must be made to preserve error for appeal. However in **Marin v. State**, 851 S.W.2d 275, 278 (Tex. Crim. App. 1993), the Court of Criminal Appeals held that the general preservation requirement does not apply to all claims. In **Marin** the court separated the rights of a defendant into three categories:

> The first category of rights are those that are "widely considered so fundamental to the proper functioning of our adjudicatory process . . . that

> they cannot be forfeited . . . by inaction alone." These are considered " absolute rights."
>
> The second category of rights is comprised of rights that are "not forfeitable" --they cannot be surrendered by mere inaction, but are "waivable" if the waiver is affirmatively, plainly, freely, and intelligently made. The trial judge has an independent duty to implement these rights absent any request unless there is an effective express waiver.
>
> Finally, the third category of rights are "forfeitable" and must be requested by the litigant. Many rights of the criminal defendant, including some constitutional rights, are in this category and can be forfeited by inaction.

Rule 33.1's preservation requirements do not apply to rights falling within the first two categories. Rather than existing in conflict with one another, **Rule 103(e) Texas Rules of Evidence**, **Jasper v. State**, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001), and **Marin** all stand for the same uncontroversial proposition: Some rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system. The "fundamental error[s]" described in Rule 103(e) and **Jasper** are simply category-one and two Marin errors. **Proenza v. State**, 541 S.W.3d 786 (Tex. Crim. App. 2017).

It is Respondent's position that the error is either a first or second category **Marin** error. It is widely considered to be fundamental to the proper functioning of our adjudicatory process that the prosecution not create a false impression to the jury. The Constitution requires introduction of only otherwise relevant and admissible evidence. **Hale v. State**, 140 S.W.3d 381, 396 (Tex.App.-Fort Worth 2004, pet. ref'd).

If the trial court's error is not constitutional, then **TEX.R.APP. P. 44.2(b)** applies. A non-constitutional error must be disregarded unless it affects the substantial

rights of the accused. **Pollard v. State**, 255 S.W.3d 184, 190 (Tex.App.-San Antonio 2008), aff'd, 277 S.W.3d 25 (Tex.Crim.App.2009). "To make this determination, [the court] must decide whether the error had a substantial or injurious effect on the jury verdict…substantial rights are not affected by the erroneous admission of evidence if, after examining the record as a whole, we have a fair assurance that the error did not influence the jury, or had but a slight effect." **Pollard**, supra.

In assessing the degree of the impact of a non-constitutional error on the jury's verdict, the court should consider the entire record, including: (1) all physical evidence and testimony; (2) "the nature of the evidence supporting the verdict"; and (3) the nature of the error and how the erroneously admitted evidence "might be considered in connection with other evidence in the case." see also **Motilla v. State**, 78 S.W.3d 352, 355-56 (Tex.Crim.App.2002). The court may also consider: (4) the jury instructions; (5) the parties' respective theories and closing arguments; and (6) voir dire, if applicable. **Motilla**, supra.

The Tenth Court of Appeals found a violation of a category one or two rights that was not forfeitable.

THE STATE'S USE OF PHONE RECORDS WAS MISLEADING

The state's argument is entirely based on whether unadmitted phone records used by the prosecutors to cross examine witnesses Reed and Tagive were false. The argument is completely misguided. The use of the unadmitted phone records by the prosecutors by implying that they were evidence of the untruthfulness of the witness Reed and Tagive's testimony is the issue.

The clear use of the records without any proof admitted in the record showing they were in conflict with the witness' testimony is the false impression created by the prosecutors. The improper use of unadmitted phone records is the uncontroverted basis of the finding of due process violation by the Tenth Court of Appeals. Any attempt to divert the issue to the correctness of the unadmitted phone records is misguided.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the order of the Court of Appeals for the Tenth District be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S BRIEF ON THE MERITS ON PETITION FOR DISCRETIONARY REVIEW was forwarded to the following attorneys by electronic filing:

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SIGNED this 25th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

At the request of the Court, I certify that this submitted brief complies with the following requests of the Court:

1. This filing is labeled with or accompanied by the following information:

a. Case Style: **SAMUEL UKWUACHU V. STATE OF TEXAS**
b. Case Number: **PD-0776-19**
c. The Type of Brief: **RESPONDENT'S BRIEF ON THE MERITS**
d. The Word Processing Software and Version Used to prepare the filing: **pdf – Microsoft Office Word 2016**
e. This document contains 4,360 numbers of words.

2. The electronic filing is free of viruses, spyware, adware, rootkits, or any other similar data or files that would be disruptive to the Court's computer system. The following software, if any, was used to ensure the filing is in compliance: **Norton Antivirus**

/s/WILLIAM A. BRATTON III
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